FILE COPY

Office Supreme Court, U.S.
FILED
SEP 23 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 424

THOMAS P. SPRUNT, *Petitioner,*

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

RAY R. MURDOCK
600F Sheraton Park Hotel
Washington 8, D. C.

C. C. PATTERSON
427 27th Street,
Ogden, Utah

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons	5
Appendix:	
Opinion of the Supreme Court of Utah	1a
Rehearing Denied	5a
Statutes	5a

Cases Cited

Allen v. The Southern Pacific Company, Texas, 106 S.W. 441	22
Anderson v. Elgin, Joliet and Eastern Railway Co., 7th Cir., Ill., 227 F. 2d 91	6
Cross v. Spokane & P. & S. R. Co., 157 Wash. 425, 291 P. 336. Certiorari denied, 1951 Supreme Court 345, 283 U.S. 821, 75 L. ed. 1436	21
Delaware L. & W. R. Co. v. Koske, 279 U.S. 7, 73 L. ed. 578	5, 7, 9
Edwards v. Southern Railroad Co., Ga., 184 S.E. 370	8
Jacobson v. Chicago N. W. R. Co., 22 N.W. 2d 455	19
Johnson v. Erie Railroad Co., N.Y., 236 F.2d 352	6
Kansas City Railroad Co. v. Roe, Okla., 1919 180 P. 371	8
Lehi Valley Railroad Co. v. Hatmaker, Pa., 69 F.2d 282	8
Murray v. The New York, New Haven & Hartford R. Co., 2d Cir., 255 F.2d 42	20
Owens v. U. P., 63 S. Ct. 1271, 319 U.S. 715, 87 L.ed. 1683	21
Pryor v. Williams, 254 U.S. 42, 65 L.ed. 120	5, 7, 10

Page

Schlemmer v. Buffalo, R. & P. R. Co., 205 U.S. 43, 51 Led 681 ..... 5, 7, 13
Schrader v. Kriesel, 45 N.W.2d 395 20
Southern Railway Co. v. Welch, Tenn., 6th Cir., 247 F.2d 340 6
Texas and Pacific Railway Co. v. Buckles, 232 F.2d 340 6
Thomas v. Union Railway Company, 6th Cir., 216 F.2d 18 ..... 7, 17
Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 87 Led 610 ..... 6, 7, 12
Williams v. Atlantic Coast Line R. Co., 190 F.2d 744 6

STATUTES

Federal Employers' Liability Act, 45 USCA, Sec. 51 ..... 3, 5a
Federal Employers' Liability Act, 45 USCA, Sec. 53 ..... 3, 6a
Federal Employers' Liability Act, 45 USCA, Sec. 54 ..... 2, 3, 7a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO.

THOMAS P. SPRUNT, *Petitioner*,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

THOMAS P. SPRUNT, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Utah entered in the above-entitled case on the 8th day of June, 1959.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Utah is unprinted in the official Utah Reports. It is found in 340 P. 2d 85, and is printed in Appendix "A" hereto, infra, page 1a.

JURISDICTION

The judgment of the Supreme Court of the State of Utah was entered on the 8th day of June, 1959. Rehearing was denied on the 26th day of June, 1959 (infra, Appendix "A", page 5a). The jurisdiction of the Court is invoked under Title 28, U.S.C.A., Section 1257 (3).

QUESTIONS PRESENTED

1. May the identical facts which formerly constituted the defense in law of assumption of risk be used as the basis for the partial defense of contributory negligence under the provisions of the Federal Employers' Liability Act notwithstanding the provisions of Title 45, U.S.C.A., Section 54?

2. The petitioner, a railway switchman, knew there were numerous holes and rough spots along a roadbed where he was required to work, but at the time of his accident they were covered by snow and he did not know their exact locations. He suffered a 50 per cent partial permanent loss of use of his left arm as a result of slipping in a snow-covered hole. These facts formerly would have constituted the defense of assumption of risk, which was "entirely obliterated" by the 1939 amendment of the FELA. May these same facts now be used as the basis for the partial defense of contributory negligence?

STATUTES INVOLVED

The statutes applied by the Supreme Court of the State of Utah are:

45 U.S.C.A., Section 51
45 U.S.C.A., Section 53
45 U.S.C.A., Section 54

The pertinent texts of these sections are set forth in Appendix "A", pages 5a, 6a and 7a.

STATEMENT

The petitioner was employed by the respondent as a switchman (R. 40). He had been so employed for thirty-two (32) years (R. 39). On the date of injury, January 4, 1957, the appellant was working as a foreman of a switch crew of the respondent in the yards of the Vitro Chemical Company (R. 39-40). The terrain adjacent to the track where the switch crews walked and worked was rough and pockmarked with holes caused by a clam shell machine (R. 22, 23, 40, 49, 105). This condition had prevailed for a period of six (6) months to the petitioner's knowledge (R. 49). Complaints had been made to the respondent through the Switchmen's Union of North America, of which the petitioner, was a member on at least two occasions prior to the accident. However, nothing was done by the respondent to rectify the unsafe condition of the roadbed (R. 104, 112, 113, 114).

Immediately prior to the injury, appellant had been checking car numbers (R. 41). As the cut of cars upon which he was working commenced to move, it became necessary by reason of a curve for petitioner to mount a side of the car to "go high," meaning to climb on top of the car to pass signals (R. 42). He pro-

ceeded to board the car in the usual, customary manner employed by switchmen, when his foot slipped into a snow-covered hole, some eight to ten inches deep, causing him to fall (R. 42, 43). The rotor cuff muscle in his left arm was damaged (R. 69, 70) and he suffered a permanent loss of use of the left arm estimated to be fifty per cent (50%), which rendered his continued employment by respondent impossible (R. 69, 70). Although the appellant and other members of the switch crew were cognizant of the fact that there were numerous holes and rough spots along the roadbed, none of them could locate the holes on that particular day by reason of the fact that it had snowed previously and the wind had blown the snow so as to cover the ground and fill the holes (R. 22, 49). The appellant could not see and did not know of the hole which caused his fall until after the accident (R. 49).

The trial court submitted the issue of contributory negligence to the jury although petitioner objected on the ground that only the barred issue of assumption of risk was available under the facts. The jury returned a verdict of $15,000.00 but reduced the award to $5,000.00 by reason of petitioner's alleged contributory negligence.

Petitioner renewed his objections in a motion for judgment notwithstanding the verdict or for a new trial, before the Supreme Court of Utah on appeal, and upon petition for rehearing. All his efforts were unavailing. As a result, petitioner is not only unable to pursue his former employment but he has been deprived of $10,000.00 to his further damage.

REASONS FOR GRANTING THIS WRIT

The decision of the Utah Court:

1. Nullifies the 1939 amendment which "entirely obliterated" the defense of assumption of risk;

2. Is in direct conflict with all of the decisions of this court construing that amendment;

3. Is in conflict with all of the decisions of the Circuit Courts of Appeal, which, without exception, identify facts of this character as assumption of risk; and

4. Is in conflict with applicable state court decisions, which differentiate between assumption of risk and contributory negligence, and hold that facts such as those in this case are encompassed in the doctrine of assumption of risk.

The railroads of America for a period of fifty (50) years skillfully and effectively engrafted onto the Federal Employers' Liability Act the doctrine of assumption of risk. In: *Pryor* v. *Williams*, 254 U.S. 42, 65 L. Ed. 120; *D. L. & W. R. Co.* v. *Koske*, 279 U.S. 17, 73 L. Ed. 578; and *Schlemmer* v. *Buffalo R. & P. R. Co.*, 205 U.S. 43, 51 L. Ed. 681; they convinced the Supreme Court of the United States that the facts in that case constituted the defense of assumption of risk and not contributory negligence.

The railroads succeeded so well that in 1939, the Congress of the United States amended the Federal Employers' Liability Act by adding 45 U.S.C.A., Section 54. In so doing, the Congress held that, as a matter of public policy and law, the doctrine of assumption of risks and the facts upon which the defense was based were no longer available to the railroads and to this respondent.

The Supreme Court of the United States in *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 87 L. Ed. 610, held that "every vestige of the doctrine of assumption of risk was obliterated by the 1939 amendment." It further held that "an employee could not be charged with contributory negligence simply because he assumed the risk."

The railroads rose to the attack. They first attempted to defeat the 1939 amendment and the law of *Tiller* v. *Atlantic Coast Line Railroad Co., supra*, by contending that the facts which they had contended previously constituted assumption of risk were really not assumption of risk at all but, on the contrary, constituted proof of non-negligence. This attack on the law was repulsed by the following decisions:

Anderson v. *Elgin, Joliet and Eastern Railway Co.*, 7th Cir., Ill., 227 F. 2d 91
Johnson v. *Erie Railroad Co., N. Y.*, 236 F. 2d 352
Southern Railway Co. v. *Welch, Tenn.*, 6th Cir., 247 F. 2d 340
Texas and Pacific Railway Co. v. *Buckles*, 232 F. 2d 257
Williams v. *Atlantic Coast Line R. Co.*, 190 F. 2d 744

As a result, the railroads have changed their tack. Now, they are attempting to emasculate the 1939 amendment and render its intended aid and relief a nullity by completely reversing fifty (50) years of earnest contention. Here in the first reported decision of its kind, the carrier maintains in effect that the facts which it claimed for fifty (50) years constituted assumption of risk is not assumption of risk at all — that they were wrong all the while and that these facts really constitute contributory negligence. If the deci-

sion of the Supreme Court of Utah is upheld, it is foreseeable that the railroads will succeed in defeating some claimant's rights by convincing a jury that the claimant's injuries were caused solely by his negligence. The proof of said claimant's negligence will be based upon facts which formerly constituted assumption of risk. If this appears far-fetched, consider that, in this case, the respondent succeeded in nullifying $10,000.00 out of a $15,000.00 verdict.

However, the Supreme Court of the State of Utah decided this case contrary to the express pronouncements of the following decisions in the Supreme Court of the United States:

Schlemmer v. *Buffalo, R. & P. R. Co.*, 205 U.S. 43, 51 L. Ed. 681;
Pryor v. *Williams*, 254 U.S. 42, 65 L. ed. 120;
D. L. & W. R. Co. v. *Koske*, 279 U.S. 7, 73 L. ed. 578;
Tiller v. *Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 87 L. ed. 610.

The Supreme Court of the State of Utah further ignored the following case from the United States Circuit Court of Appeals:

Thomas v. *Union Railway Co.*, 6th Cir., 216 F. 2d 18.

The facts as set forth above and which are uncontroverted by any testimony on the part of the respondent demonstrate a classic example of those facts which have always been judicially determined to constitute assumption of risk. If it be claimed that in some way the appellant was derelict in failing to do some act or acts, it has been found under the law as set forth in the cases above that such act or acts are so close to and

commingled with the facts creating the doctrine of assumption of risk as to be a part thereof.

The sole question therefore is whether the Supreme Court of the State of Utah, in finding that these facts could support a finding of contributory negligence, erred.

The problem as to what constitutes assumption of risk, which is outlawed by statute, and what constitutes contributory negligence on the part of an employee, is a difficult, close question. An examination of the law prior to 1939 and the law subsequent to 1939 discloses a very interesting fact, namely, that the facts in issue here have always been held to be facts constituting the defense of assumption of risk.

Thus, in *Kansas City Railroad Co.* v. *Roe*, Okla. 1919, 180 P. 371, the Court held that a switchman having knowledge of the rough and uneven condition of a track assumed the risk of the derailment which was caused by the defective condition of the roadbed.

In *Edwards* v. *Southern Railroad Co.*, Ga. 184 S.E. 370, the Court held as a matter of law that an experienced switchman assumed the risk of injury from soft uneven dirt and gravel alongside the track; that he also assumed the risk of broken, rotten and uneven cross ties at a place where a switchman attempted to mount an engine.

It will be observed that the facts in the cases are almost precisely the facts involved in the case at bar.

In *Lehi Valley Railroad Co.* v. *Hatmaker, Pa.*, 69 F. 2d 282, a railroad switchman who slipped and fell injuring his knee while closing a switch was held not to be entitled to recovery because he assumed the risk of

injury from frost, grease and dirt on the ties by reason of the fact that he had knowledge thereof, and in addition he had knowledge of the defective condition of the ground below the ties.

These views were finally and conclusively established by the Supreme Court of the United States in *Delaware L. & W. RR Co.*, v. *Koske*, *supra*. The petitioner sued in the Circuit Court of Hudson County, New Jersey, to recover damages sustained by him when, in the dark and while alighting from an engine in the course of his employment, he stepped or fell into an open ditch. The conditions relative to the ditch had been constant and of long duration. The plaintiff had known of the location of the ditch and its condition at the place in question.

Justice Butler speaking for the Supreme Court stated on page 581:

> "* * * And, except as provided in § 4 of the act, the employee assumes the ordinary risks of his employment; and when obvious, or fully known and appreciated, he assumes the extraordinary risks and those due to negligence of his employer and fellow employees. Seaboard Air Line R. Co. v. Horton, 233 U.S. 492, 501, 58 L. ed. 1062, 1068, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N.C.C.A. 834; St. Louis-San Francisco R. Co. v. Mills, 271 U.S. 344, 70 L. ed. 979, 46 Sup. Ct. Rep. 520; Northern R. Co. v. Page, 274 U.S. 65, 75, 71 L. ed. 929, 933, 47 Sup. Ct. Rep. 491."

Justice Butler in reversing the judgment of the jury for the plaintiff concluded by saying at page 582:

> "* * * He worked in daylight for some time every morning during the spring and summer

> months, and during one year he worked days. There was nothing obscure or of recent origin about the place where he was injured. The conditions were constant and of long standing. The evidence requires a finding that he had long known the location of the drain and its condition at the place in question. The dangers attending jumping from engines in the vicinity of the drain, especially in the dark, were obvious. Plaintiff must be held to have fully understood and appreciated the risk.
>
> "It was the duty of the judge presiding at the trial to direct the jury to return a verdict in favor of the defendant."

In all of these cases, the question was not that of the negligence of an employee which would only mitigate damages, but that of an absolute defense to any damages on the basis of the employee's assumption of risk, and uniformly under the facts at bar, as the preceding cases show, the defense was found to be a valid defense as a matter of law.

The Supreme Court had a similar problem in *Pryor v. Williams, supra*. While in the course of his duties as a railroad employee, Williams was instructed to tear down a bridge on the line of the railroad, and while so engaged a defective claw bar which he was directed to use caused the bar to slip while he was attempting to draw a bolt. By reason of the slip, Williams lost his balance, fell to the ground, a distance of twelve (12) feet, and received the injuries which were the subject of that action. By way of defense, the carrier charged contributory negligence and assumption of risk.

The trial court found that the claw bar was defective in that the claws had become so rounded and dull

that they could not be made to grab the shank securely, and that this defect was so obvious that the most cursory and superficial examination would have disclosed it to the plaintiff. The trial court held that this was contributory negligence, not assumption of risk. The Court of Appeals reversed, holding that it was assumption of risk and not contributory negligence. The Supreme Court of Missouri sustained the trial court and the case went to the Supreme Court of the United States on certiorari.

Justice McKenna speaking for the Supreme Court, in citing a substantial number of cases, reversed the Supreme Court of Missouri, sustained the Missouri Court of Appeals and held that these facts constituted the defense of assumption of risk as a matter of law.

Here, the Court had before it claims that these acts constituted contributory negligence and claims that the facts constituted assumption of risk. Both claims had received support in the lower courts. The Supreme Court could have held either: (1) the facts constituted contributory negligence, or (2) the facts constituted both assumption of risk and contributory negligence. Nevertheless, the Court found that these facts constituted assumption of risk even though the petitioner knew of the specific defect and persisted in using the claw bar when it would appear obvious that in so doing he was running the risk of injury.

How can one conclude that, if the aforesaid facts constitute assumption of risk, the case of petitioner herein, who knew generally of the defective condition of the roadbed but who had no specific knowledge of the hole in which he fell, does not come within the doctrine?

In the year 1939, the Congress of the United States passed an amendment to the Federal Employers' Lia-

bility Act, now known as Title 45 U.S.C.A., Section 54. The effect of this amendment was to provide that a railroad employee did not assume the risk of the negligence of the carrier or of his co-employees, and that the doctrine of assumption of risk as known and identified in the previous judicial decisions would not continue to exist as a defense available to a carrier. The amendment left unanswered the question as to whether the facts which previously constituted assumption of risk might as such be considered by a court or jury as contributory negligence. The Supreme Court of the United States in the case of *Tiller v. Atlantic Coast Line R. Co., supra*; answered this question in the negative. Mr. Justice Black speaking for the majority of the Court stated at page 612:

> "* * * We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of (March 2, 1893, 45 U.S.C.A. § 1, 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name'; and no such result can be permitted here."

In a concurring opinion, Mr. Justice Frankfurter stated at page 620:

> "The point is illustrated by two opinions of Mr. Justice Holmes. In Selflemmer v. Buffalo, R. & P. R. Co., 205 U.S. 1, 12, 13, 51 L. ed. 681, 686, 687, 27 S. Ct. 407, he called attention to the danger of relieving from liability for negligence by talking

about 'assumption of risk'—a danger resulting from the ambiguity of the phrase. 'Assumption of risk' by an employee may be a way of expressing the conclusion that he has been guilty of contributory negligence.

"But an employee cannot be charged with contributory negligence simply because he 'assumed the risk'; the inquiry is, did his conduct depart from that of a reasonably prudent employee in his situation? As Mr. Justice Holmes admonished us in the Schlemmer case, 'unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name.'

Justice Frankfurter specifically referred to and quoted from the decision of Justice Holmes in *Schlemmer v. Buffalo, R. & P. R. Co., supra.* While Mr. Justice Black did not so specifically identify that decision it is significant to note that he cited the Holmes decision in *Schlemmer v. Buffalo, R. & P. R. Co., supra,* as the authority for the above quotation. The majority opinion and the concurring opinion specifically cited and reaffirmed the words of Mr. Justice Holmes and make necessary a re-examination and appraisal of that case as it relates to the case at bar.

In *Schlemmer v. Buffalo, R. & P. R. Co., supra,* the Supreme Court of the United States reviewed a judgment of the Supreme Court of the State of Pennsylvania affirming a judgment of the Court of Common Pleas for Jefferson County, Pennsylvania, which granted a non-suit in an action for a death of a railroad employee. The Supreme Court found as facts that the decedent was injured while attempting to couple a shovel car to a caboose. In performing these acts, it was necessary for the decedent to get between

the cars and keep below the level of the bottom of the shovel car. He was aware of the danger to him and had been specifically ordered twice to keep his head down by the head conductor. Notwithstanding the knowledge he had and the warnings, in making the coupling the decedent rose a little too high and the top of his head was crushed resulting in his death. The trial court sustained a non-suit on the ground of the deceased's contributory negligence and the judgment was affirmed by the Supreme Court of Pennsylvania on that ground.

Thus, it will be observed that the Court had before it the precise question as to whether the doctrine of assumption of risk or the doctrine of contributory negligence was available, and whether the fact that the deceased had raised his head too high, contrary to the express orders of his superior, was such a fact as would take the case out from the doctrine of assumption of risk and into the doctrine of contributory negligence. Justice Holmes speaking for the Court, answered this question in the negative and reversed the Supreme Court of the State of Pennsylvania. The Court's reasoning and the distinction drawn between the assumption of risk and contributory negligence are so important as to warrant extensive quotation. Thus, Justice Holmes stated at page 686:

> "Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same

ground. Choctaw, O. & G. R. Co. v. McDade, 191 U.S. 64, 68; 48 L. ed. 96, 100; 24 Sup. Ct. Rep. 24. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master (a matter upon which we express no opinion), then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk under another name. Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as convertible terms. Patterson v. Pittsburg & C. R. Co. 76 Pa. 389, 18 Am. Rep. 412. We cannot help thinking that this has happened in the present case, as well as that the ruling upon Schlemmer's negligence was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound."

Finally, Justice Holmes stated at page 687:

"* * * We are clearly of opinion that Schlemmer's rights were in no way impaired by his getting between the rails and attempting to couple the cars. So far he was saved by the provision that he did not assume the risk. The negligence, if any came later. *But suppose the non-suit has been put clearly and in terms on Schlemmer's raising his head too high after he had been warned. Still we could not avoid dealing with the case, be-*

cause it still would be our duty to see that his privilege against being held to have assumed the risk of the situation should not be impaired by holding the same thing under another name. If a man not intent on suicide but desiring to live, is said to be chargeable with negligence as matter of law when he miscalculates the height of the car behind him by an inch, while his duty requires him, in his crouching position to direct a heavy drawbar moving above into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however, unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all. But whatever may have been the meaning of the local courts, we are of opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer did not assume, that to enforce the statute requires that the judgment should be reversed."

"Judgment reversed."

Under this decision, it is necessary to conclude that contributory negligence may not be used as a basis for defense if predicated upon the facts which constitute assumption of risk. Indeed, one is compelled to go further and conclude that, even if the acts would usually be deemed to constitute negligence, such is not the case if they are clearly and inevitably attached to the risk involved. In other words, they cannot be considered other than as included within the doctrine of assumption of risk.

Schlemmer, knowing that raising his head too far would be dangerous and having received instructions

relative thereto was found not guilty of contributory negligence. It is submitted that the failure of this petitioner to take some unspecified acts to ascertain the possible existence of a possible hole whose location and accompanying danger he was not cognizant of, except in a remote and general way, can only be encompassed by the doctrine of assumption of risk. It is undisputed here that the petitioner knew that there were many holes and pockmarks in that general area. It is likewise undisputed that he had no knowledge of the existence of the hole which caused his fall. If these facts were held to constitute contributory negligence then there would be no meaning to the doctrine of assumption of risk, because the doctrine of contributory negligence would immediately become operative prior to the time of the act resulting in an injury. The intent of Congress in enacting Title 45 U.S.C.A., Section 54, would be entirely avoided and the railroads could safely contend that the accident was solely the fault of the employee because he had knowledge of the existence of the dangerous conditions. That is not the proper interpretation of the decisions heretofore mentioned, as illustrated by the case of *Thomas v. Union Railway Company*, 6th Cir., 216 F. 2d 18.

That case was decided in 1954, fifteen (15) years after the passage of the 1939 amendment. Upon leaving his office and stepping from the porch thereof onto the concrete floor of the round house, the plaintiff slipped and fell because of pin grease that had been left upon the concrete through the negligence of the railroad. The carrier did not at that time have available to it the doctrine of assumption of risk. However, it defended on the basis that the dangers to the plaintiff were obvious to him, and were as well known

to the plaintiff as they were to the defendant and therefore the carrier could not be held liable for injuries sustained. This in substance and effect is a sort of a last clear chance doctrine, since it argues that if the employee knew or should have known of the danger that existed and was hurt, the injury was solely due to the fault or negligence of the employee because he had the last opportunity to avoid his injury. The Circuit Court disposed of this argument in accordance with the views heretofore set forth, saying at page 19:

> "The trial court charged the jury that the railroad was not liable for injuries sustained from dangers that were obvious or as well known to the injured party as to the railroad; and that if the jury found from the evidence a dangerous condition of the concrete floor near the foreman's office, in the roundhouse, or deficient lighting facilities in that place, 'if such dangerous condition existed, was obvious, or as well known to the plaintiff Thomas as to the railroad, the defendant would not be liable for injury sustained from such dangerous condition.' The foregoing charged the employee with assumption of risk. This was error, as 'every vestige of the doctrine of assumption of risk was obliterated from the law (the Federal Employers' Liability Act) by the 1939 amendment.' Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 58, 63 S. Ct. 444, 446, 87 L. ed. 610. Even though the employee may know that the employer has been negligent in the furnishing of a safe place to work, the employee does not, under the Federal Employers' Liability Act, assume the risks of such danger. Williams v. Atlantic Coast Line R. Co., 5th Cir., 190 F. 2d 744, 748."

Accordingly, the Circuit Court reversed the trial court's verdict and sent the case back for a new trial. Again let us point out that the 5th Circuit sent a case back for a new trial where a man stepped upon grease

which he knew to be in the area on the basis that these facts did not constitute negligence, but did in fact constitute assumption of risk. If that be true, can the appellant herein be penalized for stepping into a hole that he did not know existed?

The petitioner herein bases his case on the negligence of the respondent railroad. If every vestige of the doctrine of assumption of risk was obliterated by the 1939 amendment, then any defense based upon the petitioner's acts or omissions must likewise have been obliterated, because petitioner fell into a hidden hole (unlike Thomas who was charged with actual knowledge of the condition that caused his injury). The respondent railroad has never seriously contended in instructions or brief that in this case petitioner assumed risks not due to the fault or negligence of the carrier or its agents.

The Supreme Court of the State of Minnesota has adopted petitioner's theory as the correct statement of the law in *Jacobson* v. *Chicago N. W. R. Co.*, 22 N.W. (2) 455, wherein the Court stated at page 459:

> "In determining whether plaintiff was guilty of contributory negligence and whether, as defendant claims, his contributory negligence was the sole proximate cause of the accident, it is our plain duty to lay out of mind any question of whether he was guilty of assumption of risk, because that defense was entirely obliterated by the 1939 amendment of the act. Crawford v. D. M. & I. R. Ry. Co., 220 Minn. 225, 19 N.W. 2d 384. The defense of assumption of risk is not to be let in under the label of contributory negligence. Tiller v. Atlantic Coast Line R. Co., 318, U.S. 54, 63 S. Ct. 444, 88 L. ed. 610, 143 A.L.R., 967 supra. See, Maloney v. Cunard Steamship Co., Ltd., 217 N.Y. 278, 111 N.E. 835."

While not a railroad case, the Supreme Court of Minnesota had before it in *Schrader* v. *Kriesel*, 45 N.W. 2d 395 a problem involving almost identical facts to those herein. The owner of a used car lot was sued by a customer who sustained injuries while walking on the lot. The plaintiff testified that upon entering the lot she noticed its surface was rough. She admitted that she had previously been on it and that there had been ice and snow on it, but that it was not as bad as it was on the date of the injury. In walking in the lot, the plaintiff slipped in a rut and fell, breaking her leg. The rut appeared to have been made by a car wheel; however, plaintiff testified she didn't see the rut because it was covered with snow. The defendant contended that plaintiff had assumed the risk. There was no contention that any other defense doctrine was applicable. Indeed, the Supreme Court clearly distinguished between the elements of assumption of risk and ordinary negligence and held that the issues had been properly submitted to the jury on the doctrine of assumption of risk.

The petitioner does not wish to appear in the position of stating that it is impossible for there to be contributory negligence in a case at the same time that there is assumption of risk, because that likewise would be clear perversion of the words of Justice Holmes, Justice Black, and Justice Frankfurter. This distinction is clearly set forth in the case of *Murray* v. *the New York, New Haven and Hartford R. Co.*, 2nd Cir., 255 F. 2d 42.

On January 24, 1953, the plaintiff therein, a locomotive engineer, employed by the defendant, went to the defendant's shop to pick up an engine. Three engines had been assigned to this run and had been lined up upon a single track. The engineer discovered

that the first engine was defective and so notified the foreman of the hostlers to remove it. The plaintiff climbed aboard the lead engine. The hostler moved it forward so that the foreman could move the defective engine onto another track. When this was accomplished, the hostler began to move the first engine back to couple onto the third engine. The coupling was made with such severity that the plaintiff fell back against a partition and suffered the injuries which were the subject of that action.

Just before the defendant rested its case, it read into the record an operating rule of the defendant's the effect of which was to provide that it was contrary to the company's rule for the plaintiff to be riding on the engine under the circumstances existing at the time of injury. The violation of a company rule has always been a fact outside the doctrine of assumption of risk. See, *Owens* v. *U. P.*, 63 S. St. 1271, 319 U.S. 715, 87 L. ed. 1683. The violation of a rule does not constitute assumption of risk but is at most contributory negligence leading to a division of damages. *Cross* v. *Spokane & P. & S. R. Co.*, 157 Wash. 425, 291 P. 336. *Certiorari denied*, 1951, Supreme Court 345, 283 U.S. 821, 75 L. ed. 1436.

Therefore, the Second Circuit ruled that while the plaintiff could not be held negligent on the basis of the doctrine of assumption of risk, a jury could well consider whether plaintiff's violation of a company rule constituted negligence, and the amount, if any, that such negligence contributed to plaintiff's injury. Thus, the violation of the company rule was a fact outside the scope of the doctrine of assumption of risk and unrelated to such doctrine, and as a consequence, a jury was entitled to consider that fact in mitigation of damages.

It is submitted that the true rule is set forth in the case of *Allen v. The Southern Pacific Company, Texas*, 106 S.W. 441, page 446:

> "* * * If, in cases where the same facts which would make out the defense of assumed risk (were such defense not abolished) would also constitute the defense of contributory negligence, the latter defense should be allowed to prevail, the humane and beneficent purpose of Congress would in a large number of cases be rendered abortive. Therefore, as a statute should be so construed as to accomplish its evident intention and purpose, we are of the opinion that the act, in abolishing the defense of assumed risk, did away with any other defense, though of a different name, which would be constituted by identically the same facts which go to establish that of assumed risk."

It is submitted, therefore, that it was error on the part of the trial court to submit the question of contributory negligence to the jury on the basis of the facts adduced at this trial, that it was error on the part of the Supreme Court of the State of Utah to affirm said decision, and that the petitioner is entitled as a matter of law either to the restoration of the $10,000.00 deducted for contributory negligence, or to a new trial.

WHEREFORE petitioner prays that a writ of certiorari issue to review said judgment.

Respectfully submitted,

RAY R. MURDOCK
600F Sheraton Park Hotel
Washington 8, D. C.

C. C. PATTERSON
427 27th Street.
Ogden, Utah

Attorneys for Petitioner